

Competency Issues

By Brad E.R. Smith, M.D.

What is Competence?

- Capacity to understand and make decisions about a particular issue.
 - Understand relevant information
 - Communicate a choice
 - Appreciate situation and consequences
 - Manipulate information rationally

What is Competence?

- Competence is task-specific
- An individual is presumed competent—
incompetence is a judicial decision.

Types of Competence

- | | |
|---------------------|------------------------------|
| • To confess | • To marry/divorce |
| • To stand trial | • To refuse tx |
| • To be executed | • To consent to tx |
| • To testify | • To adopt a child |
| • To be a juror | • To vote |
| • To make a will | • To parent |
| • To manage money | • To participate in research |
| • To sue or be sued | |

Selected Topics

- Competence to stand trial
- Competence to accept/refuse medication tx
- Global incompetence

Competence to Stand Trial

- Evaluated as part of criminal court proceedings
- Evaluation often ordered when attorney discovers client is receiving, or has received mental health services in the past
- Has become an avenue of tx

Wisconsin Law

- No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

Wisconsin Statute 971.13(1)

Wisconsin Law

- Competency is a judicial rather than a medical determination. Not every mentally disordered defendant is incompetent; the court must consider the degree of impairment in the defendant's capacity to assist counsel and make decisions which counsel cannot make for him or her.

Wisconsin Statute 971.13 – ANNOT.

Dusky v. United States

- U.S. Supreme Court, 1960
- “whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.”

Competency – Task Specific

- To stand trial
- To be sentenced
- To be executed
- To be revoked
- To waive representation by counsel
- To waive appeals

Competency Evaluation

- Legal information
 - Court order for evaluation
 - Criminal complaint
 - Clarification of court proceeding
- Collateral information
 - Attorneys – clarify the reason competency raised, information regarding interactions with client, contact information for family and records

Competency Evaluation

- Collateral information (cont'd)
 - Medical records
 - Treating clinicians
 - Family/Friends
 - Past criminal record

Competency Evaluation

- Clinical examination
 - Personal history
 - Mental health history
 - AODA history
 - Medical history
 - Family history
 - Legal history

Competency Evaluation

- Clinical examination (cont'd)
 - Mental Status Examination
 - Psychological testing
 - Assessment/Diagnosis

Competency Evaluation

- Competency to proceed examination
 - Interview by qualified, trained clinician—often utilizing “McGarry Criteria”
 - Ongoing trained observations
 - Psychological tests (to assist)
 - Utilize this information with clinical, collateral, legal information to reach an opinion

Competence to Stand Trial

- May be requested by either attorney or judge
- Clinicians/mental health tx teams often suggest an evaluation to the attorney
- May be an avenue for tx for some

Informed Consent

- Person must be
 - Competent
 - Informed about relevant information
 - Free from coercion
- If a person can give informed consent, this should be respected.

Psychotropic Medication

- Information provided regarding risks, benefits, and alternatives related to proposed treatment.
- After this, can the person...
 - Express an understanding of the information given?
 - Apply this information to his/her current situation?

Typical Obstacles to Factual Understanding

- Memory deficits
- Attention deficits
- Misinterpretation of information provided
- Refusal/inability to communicate
- Irrational focus of attention

Typical Obstacles to Applying Information

- Lack of insight
- Fear of medication

Legal Proceedings

- Civil commitments
- Criminal commitment to be treated to become competent to stand trial
- Criminal commitment for a finding of not guilty by reason of mental disease or defect

Civil Commitments

- Probable cause hearing
- Final commitment hearing
- Extension hearing

Fifth Standard

- The fifth criterion to establish dangerousness/need for treatment that can be used in Chapter 51 civil commitment proceedings
 - Requires a finding of incompetence to make medication decisions

Fifth Standard

- Incompetence regarding medication
- Needs care or tx to prevent further disability or deterioration
- If not, will suffer severe mental, emotional or physical harm
 - Inability to function independently
 - Loss of cognitive or volitional control over thoughts or actions

Evaluating Competence to accept/refuse medicine

- Part of overall clinical/forensic examination
- Ask individual to explain risks, benefits, alternatives of current medication
- Provide information regarding risks, benefits, alternatives—verbal and written

Evaluation (cont'd)

- Likely focus on most common and unusual side effects of the medication
- Ask if the person will accept or refuse the recommended treatment
- Discuss any reasons provided for decision
- Probe these reasons carefully to ascertain if there is rational, legitimate reason(s) for non-compliance with recommendation
- Ask if the person agrees with the assessment regarding symptoms/need for medication.

Guardianship

- Incompetent for certain, or all, major tasks—care of self, property, money
- May be general or limited
- General guardian entitled to make decisions affecting all aspects of the ward's life
- Best interest vs. Substituted Judgment

Evaluation for Guardianship

- Court appoints physician/psychologist
- Rights, purpose of exam explained
- Clinical examination, including mental status
- Forensic focus on areas of potential incompetence—vote, property, marry, contract, driver's license, medical decisions
- Likely includes clinical screening tests and/or psychological testing
- Collateral information very important

Evaluation (cont'd)

- Comment on level of intelligence and fund of knowledge
- Comment whether or not the person is substantially capable of managing his/her property.
- Comment whether or not the person is substantially capable of caring for himself/herself.
- Comment on infirmities of aging, developmental disabilities, or other like incapacities.

Summary

- Competence is task-specific
- Incompetence is a judicial finding
- It is helpful to have clinicians trained in performing evaluations of competence